



COMMONWEALTH of VIRGINIA

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May 16, 2014

The Honorable S. Chris Jones
Member, House of Delegates
Post Office Box 5059
Suffolk, Virginia 23435

Dear Delegate Jones:

I am responding to your request for an official advisory Opinion in accordance with § 2.2-505 of the *Code of Virginia*.

Issue Presented

You inquire whether a locality may refund erroneously assessed real estate taxes for a period beyond the three-year period provided for tax refunds effected by administrative action.

Response

It is my opinion that a locality may not by administrative action refund erroneously assessed real estate taxes after the three-year limitation period has passed.

Background

While you do not provide additional details about this tax refund, published news reports indicate that the Suffolk City Assessor was contacted by the owner of two commercial parcels who alleged that the assessments, and thus the taxes determined by the assessments, were erroneous. After investigation, the City Assessor determined that (i) the value of one building was accounted for twice by the value being listed for both parcels, and (ii) the value of a second building continued to be included in assessments despite having been destroyed in a hurricane in 2003. The City Assessor then corrected the assessments retroactively for nine years and authorized a tax refund for that entire period. These actions were taken administratively by the City Assessor. That is, no lawsuit was ever filed, there was no compromise settlement of pending litigation, and no court authorized the refund.¹

The City Attorney and City Manager were not aware of the revised assessment and the refund until after they occurred. They later explained the matter by saying that the taxpayer had a right to sue the city for a refund of taxes paid based on the erroneous assessments, a court would have had the power, and

¹ See, e.g., Matthew Ward, *City flouts rules in tax refund*, Suffolk News-Herald, July 13, 2013, available at <http://www.suffolknewsherald.com/2013/07/13/city-flouts-rules-in-tax-refund/>.

sufficient evidence before it, to order the payments, and the city thus had the authority to reach a settlement with the taxpayer to avoid litigation.² However, there was no settlement document.³

While the city refunded taxes for nine years, it simultaneously learned that the taxpayer had received rehabilitation tax credits for which it did not qualify, but it billed the taxpayer for repayment for only three years.⁴ No explanation was offered by any Suffolk official for this differential treatment.

Suffolk's Code of Ordinances, in Chapter 82, Article II, authorizes the City Treasurer to refund erroneous payments of taxes, and it authorizes the Commissioner of Revenue to certify to the Treasurer any erroneous assessment of taxes, with the Treasurer then being authorized to refund the excess, together with penalties and interest.⁵ By separate law, the City Assessor is authorized to perform this function.⁶ The City Code imposes a three-year limitation on the period for which such erroneous taxes may be repaid.⁷

Applicable Law and Discussion

As a previous Opinion notes,⁸ the Supreme Court of Virginia has stated that "there is no common law remedy by which to obtain a refund of taxes."⁹ Rather, it is well established that "the procedure for correction of erroneous assessments is entirely statutory."¹⁰ Further, "no assessment, however erroneous, can be corrected except by virtue of some statute."¹¹ Accordingly, as this Office previously has concluded, "the authority to refund taxes must be derived from a statutory remedy."¹²

Another previous Opinion explains that the General Assembly, in Article 5, Chapter 39 of Title 58.1, has established "three independent procedures for correcting erroneous tax assessments: (1) administrative correction pursuant to §§ 58.1-3980 and 58.1-3981; (2) administrative correction pursuant to a local ordinance adopted pursuant to § 58.1-3990; and (3) judicial correction pursuant to § 58.1-3984."¹³ Although these procedures are distinct, "[t]he several sections of the Code relating to relief

² See, e.g., R. E. Spears, III, *City changes tax refund policy*, Suffolk News-Herald, July 18, 2013, available at <http://www.suffolknewsherald.com/2013/07/18/city-changes-tax-refund-policy/>.

³ See, e.g., Matthew Ward, *Refund, not repayment*, Suffolk News-Herald, Aug. 3, 2013, available at <http://www.suffolknewsherald.com/2013/08/3/refund-not-repayment/>.

⁴ *Id.* See also Spears, *supra* note 2.

⁵ CITY OF SUFFOLK, VA., CODE OF ORDINANCES, § 82-31(a) & (b).

⁶ The City Charter authorizes City Council to enact ordinances to have assessments made by an assessor, rather than the Commissioner of Revenue. See CHARTER FOR THE CITY OF SUFFOLK, VA., § 8.06. The City Code implements this transfer of authority to the City Assessor. CITY OF SUFFOLK, VA., CODE OF ORDINANCES, § 82-427. Thus, any laws discussed in this Opinion granting certain powers to, and imposing certain restrictions upon, the Commissioner of Revenue grant the same powers and impose the same restrictions on the City Assessor.

⁷ CITY OF SUFFOLK, VA., CODE OF ORDINANCES, § 82-31(c).

⁸ 2001 Op. Va. Att'y Gen. 187, 187 n.2.

⁹ Commonwealth v. Shell Oil, Co., 210 Va. 163, 164, 169 S.E.2d 434, 436 (1969).

¹⁰ Smith v. Bd. of Supvrs., 234 Va. 250, 255, 361 S.E.2d 351, 353 (1987).

¹¹ Commonwealth v. Conner, 162 Va. 406, 409, 174 S.E. 862, 863 (1934).

¹² 2001 Op. Va. Att'y Gen. at 187.

¹³ 1990 Op. Va. Att'y Gen. 251, 253.

against erroneous assessments of property must be considered together.”¹⁴ Because the facts of this matter entail the issuance of refunds by administrative action and not judicial decision, this Opinion will focus on the application of the administrative procedures pursuant to Suffolk’s ordinance on this subject.

In the absence of a local ordinance, the procedure to be followed for a correction of assessment and a refund of taxes requires consent of the local governing body and the local government attorney. Adjustments and refunds made pursuant to these statutes are subject to an explicit three-year limitation.¹⁵ Nonetheless, these consents need not be obtained if the locality, acting pursuant to § 58.1-3990, adopts an ordinance providing “for the refund of any local taxes or classes of taxes erroneously paid.” Under such an ordinance, if the person charged with assessing properties “is satisfied that he has erroneously assessed any applicant with any local taxes, he shall certify to the tax-collecting officer the amount erroneously assessed . . . , and if such taxes have been paid, the tax-collecting officer . . . shall refund to the applicant the amount erroneously paid” Critically, this statute provides that “[n]o refund shall be made in any case when application therefor was made more than three years after the last day of the tax year for which such taxes were assessed.” The sole exception to the three-year limit is where a particular tax is declared unconstitutional and that is not at issue here.¹⁶ There is no authority under this statute to refund administratively more than three years of excessive taxes for erroneous double taxation of a structure, as allegedly occurred in the present situation. Time limits for tax refunds have been applied in various other contexts by the Supreme Court of Virginia.¹⁷

As authorized by § 58.1-3990, Suffolk has adopted an ordinance authorizing administrative refund of taxes, upon authority of the City Assessor, without requiring approval of either the City Attorney or City Council. Consistent with the authorizing statute, it contains a three-year limit on refunds, stating “No refund shall be made in any case when application was made more than three years after the last day for which such taxes were assessed.”¹⁸

In short, Suffolk has an administrative process authorized by state law by which the City Assessor unilaterally may adjust assessments and authorize refunds. Both the enabling statute and the Suffolk ordinance enacted under its authority contain an explicit three-year limitation on refunds, with no exception made for double taxation or other errors in assessment. Under the Dillon Rule of strict construction, it is well established that political subdivisions of the Commonwealth have only those powers expressly granted or necessarily implied from express powers.¹⁹ The Dillon Rule requires a narrow construction of all powers - such as this one - that have been conferred upon and exercised by local governments.²⁰ Further, any doubt as to the existence of a power must be resolved against the

¹⁴ Commonwealth v. Pembroke Limestone Works, 145 Va. 476, 486, 134 S.E. 717, 720 (1926).

¹⁵ VA. CODE ANN. §§ 58.1-3980; 58.1-3981 (2013).

¹⁶ This process is discussed in 2000 Op. Va. Att’y Gen. 194, 196, *accord* 1996 Op. Va. Att’y Gen. 197, 199.

¹⁷ See, for example, Commonwealth v. Richmond-Petersburg Bus Lines, Inc., 204 Va. 606, 609, 132 S.E.2d 728, 731 (1963), where the Court, quoting Commonwealth v. Cross, 196 Va. 375, 83 S.E.2d 722 (1954), held that the “application [for a tax refund] must be made within the time required by the authorizing statute and in accordance with such restrictions or conditions as may be contained therein.”

¹⁸ CITY OF SUFFOLK, VA., CODE OF ORDINANCES, § 82-31(c).

¹⁹ See, e.g., Richmond v. Confre Club of Richmond, Inc., 239 Va. 77, 79, 387 S.E.2d 471, 473 (1990) (“[M]unicipal corporations possess and can exercise only those powers expressly granted by the General Assembly, those necessarily or fairly implied therefrom, and those that are essential and indispensable.”) (citations omitted).

²⁰ 2002 Op. Va. Att’y Gen. 176, 178; 2002 Op. Va. Att’y Gen. 77, 77 (citing Bd. of Supvrs. v. Countryside Invest. Co., 258 Va. 497, 522 S.E.2d 610 (1999)).

locality.²¹ As is evident, the authorizing statute does not authorize refunds beyond the three-year limitation, and thus the Suffolk City Assessor does not have implied or inherent authority to grant such refunds.

While this assessment correction and refund process was initiated by the taxpayer, the result would be the same had it been an independent correction initiated by the assessor. Such corrections, under Virginia Code § 58.1-3981, must be made “as [t]herein provided.”²² This includes being bound by the three-year limitation period. A previous Opinion concludes, based on the legislative history of these provisions, that “a correction of an assessment which is erroneous due to a mere clerical error or calculation is subject to a three-year statute of limitations.”²³ A later Opinion explicitly notes that “[t]he time limitation in § 58.1-3980(A) is applicable also to § 58.1-3981,”²⁴ and advised a commissioner that he was “no longer able to correct the assessment under § 58.1-3981, even if [he] believe[d] the assessment to have been erroneous,” because “§ 58.1-3980(A) places a time limitation on the ability of a commissioner of the revenue, or other official performing the duties of a commissioner, to correct erroneous assessments.”²⁵

Finally, as to the statements that a lawsuit could have been filed, that a court could have ordered the full nine-year refund, and therefore the City Assessor had authority to reach a settlement for that full refund, the analysis is simple. No lawsuit was ever filed, the City Assessor does not have authority to settle lawsuits, there was no settlement document, and the City Attorney (who does have inherent authority to settle lawsuits) was not even aware of the correction and the refund until after it occurred. The City Assessor chose a particular remedy to correct the assessments and refund the taxes. The remedy was administrative adjustment pursuant to the City Code. Having chosen that remedy, the City Assessor and the City were bound by the three-year limitation. There was no legal basis to refund more than three years of erroneously assessed taxes under the procedure that was followed here.

The three-year restriction that exists in both state law and the Suffolk City Code cannot be rendered meaningless by hypothetical statements made after conclusion of the refund that there might have been a lawsuit, and it might have been settled under the same terms that the City Assessor authorized administratively. This is particularly true where the parties making the hypothetical statements were not even aware of the adjustment and refund until after they occurred.

Conclusion

Accordingly, I conclude that a locality, having adopted an ordinance authorizing administrative correction of assessments that imposes a three-year limitation on tax refunds pursuant to an enabling

²¹ *Confre Club of Richmond*, 239 Va. at 79, 387 S.E.2d at 473.

²² Section 58.1-3981(B), (C). I further note that these exceptions to the taxpayer application requirement are to be strictly construed. See 1982-83 Op. Va. Att’y Gen. 525; 1982-83 Op. Va. Att’y Gen. 509, 510; 1984-85 Op. Va. Att’y Gen. 316.

²³ 1985-86 Op. Va. Att’y Gen. 256, 257, n.1 (quoting legislative impact statement stating that the purpose and effect of an adopted amendment was to “remove[] the indefinite time allowed for the correction of [such] assessments”).

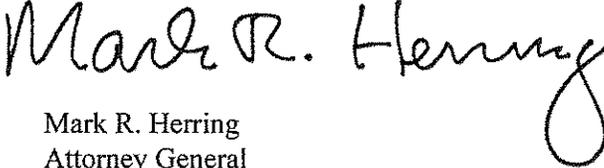
²⁴ 2004 Op. Va. Att’y Gen. 218, n.9.

²⁵ *Id.* at 221.

statute imposing that same limitation, lacks legal authority to administratively refund taxes in excess of three years.²⁶

With kindest regards, I am

Very truly yours,



Mark R. Herring
Attorney General

²⁶ In addressing related, yet distinguishable issues, previous Opinions have suggested the same conclusion: *see* 2004 Op. Va. Att'y Gen. at 221, n.18; 1990 Op. Va. Att'y Gen. at 253; 1986-87 Op. Va. Att'y Gen. at 318; 1983-84 Op. Va. Att'y Gen. 405A, 406; 1982-83 Op. Va. Att'y Gen. at 510; 1982-83 Op. Va. Att'y Gen. at 527; 1980-81 Op. Va. Att'y Gen. 64, 65; 1975-76 Op. Va. Att'y Gen. 393, 394; 1957-58 Op. Va. Att'y Gen. 282. *See also* *Mayfair Investment Props. v. Alexandria*, 5 Va. Cir. 155, 157 (Alexandria 1984) (upholding a provision of a tax refund ordinance and distinguishing the provision at issue from one that would have extended the three year filing deadline). I also note that, while a particular locality's Charter could provide greater authority to the locality to make additional tax refunds, *see* VA. CODE ANN. § 15.2-1103 (2012), the Charter for the City of Suffolk contains no provision for any such enhanced authority.